Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

No. 92-960

In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CONGRESSMAN DON EDWARDS AND CONGRESSMAN JOHN CONYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a private citizen who obtains unclassified government information may be convicted of theft of government property (18 § U.S.C. 641) or wire fraud (18 U.S.C. § 1343) where disclosure of the information, although not prohibited by statute or published regulation, violates internal government rules, custom or practice.

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INTEREST OF *AMICI CURIAE*

Congressman Don Edwards is Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary. Congressman John Conyers is Chairman of the House Committee on Government Operations and is also a member of the House Committee on the Judiciary. In these positions, Congressmen Edwards and Conyers have a strong interest in and appreciation for the civil liberties and separation of powers issues raised by this petition. They believe that imposing criminal sanctions for the receipt of information from the government where there is no explicit statute or regulation forbidding the disclosure of this information threatens the principles of open government

and the separation of powers that they were elected, in part, to preserve.

Congressmen Edwards and Conyers believe that their perspective as Members of Congress may prove of assistance to the Court in its consideration of this petition. They submit this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

Petitioners Thomas McAusland and Christopher Pafort were convicted of obtaining in 1987 and early 1988 unclassified government information related to bids on various defense contracts being sought by their employer, Litton Data Systems, Inc. Although Congress has subsequently enacted, and the President has signed into law, legislation that expressly forbids the giving and receiving of the kind of information obtained by Petitioners,[1] there was no statute or formal regulation restricting access to this information at the time of the actions in question.[2]

Nevertheless, the Justice Department prosecuted (and Petitioners were convicted) under the theory that no explicit statute or regulation restricting access to this information was required to find a violation of 18 U.S.C. § 641. Section 641 imposes criminal penalties on a person who "knowingly converts * * * or without authority, sells, conveys or disposes

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[1] The Procurement Integrity Act of 1988, 41 U.S.C. § 423 (Supp. 1992).

[2] There is nothing in the record below to suggest that Petitioners received this information as a result of bribery or any other improper conduct.

of any * * * thing of value of the United States."[3] Petitioners' convictions were obtained on the theory that information is a "thing of value" under § 641 and that the acquisition of such information in contravention of an agency's internal, unpublished custom and practice of keeping information confidential was "without authority" and therefore a violation of Section 641.[4]

REASONS FOR GRANTING THE PETITION

This Court has never construed the term "without authority" in Section 641 or determined how or whether the statute applies to information. This case, therefore, raises issues of first impression that are of exceptional importance to the principles of open government and the separation of powers.

The Fourth Circuit's interpretation of the "without authority" element of Section 641 is incompatible with those principles. By elevating informal internal policies of a government agency to the level of criminal statutes, the Court of Appeals' formulation would permit any bureaucrat with the "authority" to restrict access to information to essentially enact a new criminal statute. This result flies in the face of the authority of Congress – not the judiciary, prosecutors or federal agencies – to determine the kinds of conduct that will be subject to criminal sanctions.

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[3] The Government's theories under sections 371 and 1343 derived from the same notion that this information was "property" and that private individuals can be criminally liable for obtaining information whose disclosure violates an unpublished, internal government practice or policy, but no statute or regulation.

[4] Additional details concerning the background on this case are provided in the Statement contained in the Petition for a Writ of Certiorari which, in the interest of brevity, is adopted by *Amici*.

Moreover, the Fourth Circuit has incorrectly presumed that Congress intended that government information be considered a "thing of value" under Section 641. The statute contains no indication that it was intended to apply to information or to any other intangible item. Where Congress has intended to restrict access to information it has done so specifically and with precision. No such precision exists in Section 641.

Constitutional principles and numerous statutes enacted by the Congress reflect a presumption that government information should be made available to citizens. This presumption should only be overcome – and criminal sanctions should only be imposed – where Congress has clearly and unambiguously determined that the receipt of particular information should be restricted.

I. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 641's "WITHOUT AUTHORITY" LANGUAGE IS CONTRARY TO THE PRINCIPLES OF OPEN GOVERNMENT AND FREE ACCESS TO GOVERNMENT INFORMATION, AND IS INCONSISTENT WITH THE SEPARATION OF POWERS

A. Section 641 Must Be Construed Narrowly In Light Of Principles Of Open Government And Free Access To Government Information Embodied In The Constitution And In Numerous Statutes

Even if government information can be a "thing of value" under Section 641, it would be absurd to assume that Section 641 covers *all* transfers of government information. The free transfer of information from the government to private individuals is pervasive and, unlike the transfer of other items that may be "things of value," is fundamental and beneficial to our system of government. Nonetheless, those in government will always attempt to impose limits on the public's access to information in order to obfuscate mistakes

and avoid embarrassment.[5] See *United States* v. *Morison*, 844 F.2d 1057, 1081 (4th Cir. 1988) (Wilkinson, J., concurring) ("There exists the tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments and to manage news in a fashion most favorable to itself.") It was this realization, in part, which motivated the Founders to draft the First Amendment and provided the impetus for Congress' consideration and passage of numerous statutes reflecting a presumption in favor of open access to government information. Section 641 should be construed narrowly in light of that presumption.

B. The Availability Of Government Information Is Implicit In The Constitution

The principles of open government and free access to government information are part of the philosophical underpinnings of the United States Constitution. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (availability of government information necessary to ensure an informed citizenry, which is "vital to the functioning of a democratic society, [and is] needed to check against corruption and to hold the governors accountable to the governed"). As James Madison wrote: "A popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." *9 Writings of James Madison* 103 (G. Hunt ed. 1910) *(quoted in Morison*, 844 F.2d at 1081 (Wilkinson, J., concurring)). These principles inform not only the First

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[5] Justice Stewart has described the tug and pull between the government and the press over information as a "contest": while the government may have internal policies against disclosure of certain types of information, parties outside the government are free to attempt to obtain and use that information. Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 635-36 (1975). Congress may resolve this contest, making merely engaging in it illegal, only through "carefully drawn legislation." *Id.* at 636.

Amendment, but other constitutional provisions, such as the right to vote and to otherwise participate in the political process. They serve the goal of the First Amendment to "enlighten public decisionmaking in a democracy." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976); See *United States* v. *Hubbard*, 474 F. Supp. 64, 80 (D.D.C. 1979) ("free exchange of ideas, especially ideas in possession of the government, is at the very heart of our first amendment guarantees"). They apply with equal force regardless of the reasons that information is sought and irrespective of the kind of information at issue. *Id.* (pursuit and exchange of commercial information "indispensable").

In light of the fundamental role of the dissemination of government information in our generally open system of government, the Court should read the "without authority" language narrowly. See *Garner* v. *Louisiana*, 368 U.S. 157, 202 (1961) (Harlan, J., concurring) (statutes criminalizing conduct touching on First Amendment principles must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State"). The Fourth Circuit's formulation – that "authority" can mean an informal custom and practice of an agency – is incompatible with these notions.

C. Congress Has Created A Presumption Of Access To Government Information

Numerous statutes reflect Congress' longstanding view that there is a presumption of open access to government information. For example, the Copyright Act, 17 U.S.C. § 105 (1977), exempts government information from copyright protection. The Freedom of Information Act requires public disclosure of agency records, subject to certain specific exceptions. 5 U.S.C. § 552 (1988). See *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976) ("disclosure, not secrecy, is the dominant objective of [FOIA]").

Similarly, the Government in the Sunshine Act requires most agency business to be conducted in a manner that is "open to public observation." 5 U.S.C. § 552b (1977).

Congress is well aware that some policy objectives may at times interfere with the principles of open government and has demonstrated in numerous instances, mostly relating to national security, that it knows how to exempt certain information from the presumption of full disclosure when it wants to. See, *e.g.*, The Espionage Act, 18 U.S.C. § 793 (1976); Atomic Energy Act, 42 U.S.C. §§ 2161-2166 (1973); Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421-26 (1991); Arms Export Control Act, 22 U.S.C. §§ 2751-2796 (1990); National Security Act, 50 U.S.C. § 401-432 (1991). These statutes, and the regulations promulgated pursuant to them, provide specific prohibitions concerning the disclosure of information or data.[6] See, *e.g.*, 22 C.F.R. §§ 120.21, 121.1 (U.S. Munitions List regulations). Even in FOIA, which embodies the presumption of openness, Congress has provided specificity in setting forth the

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[6] The government here has taken the position that an informal, unwritten rule is sufficient and it is this position which *Amici* assert is demonstrably incorrect. Therefore, for purposes of this case, the Court need not consider whether formal regulations, published in the Code of Federal Regulations and subject to the usual notice and comment periods as well as the other provisions of the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 (1977), can define conduct subject to criminal sanctions. However, formal rulemaking procedures are distinguishable from the kinds of informal practices on which the government relies in this case. Rulemaking is conducted in accordance with an Act of Congress – the APA – and generally is undertaken pursuant to statute. Moreover, because such rules are in published form, Congress can exercise its oversight function. Thus, formal rulemaking procedures have at least some imprimatur of congressional approval, a characteristic completely absent here.

information that can be withheld, subject to rights of appeal within the agency and to judicial review. 5 U.S.C. § 552(b).

Congress' and this Court's treatment of Exemption 3 to FOIA's disclosure mandate (5 U.S.C. § 552(b)(3)) is instructive in demonstrating Congress' intent and ability to narrowly circumscribe exceptions to the presumption of open access to government information. As originally enacted, Exemption 3 protected information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3)(1970). In *FAA* v. *Robertson*, 422 U.S. 255 (1975), this Court interpreted Exemption 3 to allow statutes predating FOIA which permitted the withholding of information to remain unaffected by the presumption of disclosure in FOIA. 422 U.S. at 265. The Court therefore held that a provision in the Federal Aviation Act providing nearly unlimited discretion to agency officials to withhold particular documents "in the interest of the public" fell within Exemption 3. *Id.* at 266.

Concerned that the holding in *Robertson* would enable agencies to subvert FOIA's mandate of disclosure, Congress amended Exemption 3 in 1976 to avoid open-ended discretionary agency decisionmaking regarding government disclosure. As amended, Exemption 3 allows an agency to withhold information where a statute: "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(1977).

These enactments demonstrate Congress' abiding concern for the principle of access to government information. In light of these considerations, the "without authority" language must be read narrowly to avoid infringing on the central role of open access to information in our system of government. Permitting informal, unwritten customs and practices to trigger criminal sanctions would give government agencies unbridled "authority" to choose among the vast array of

government information and render its dissemination or receipt criminal conduct. That scenario is incompatible with the open system of government envisioned by the Founders and the Congress.

D. The Court Of Appeals' Reading Of "Without Authority" Is Contrary To Separation Of Powers Principles

1. Congress Is The Appropriate Entity To Determine Whether And When Disclosure Or Receipt Of Information May Be A Crime

It is Congress, not bureaucrats, prosecutors or the Courts, that has the authority to criminalize conduct relating to the flow of information. *United States* v. *Kozminski*, 487 U.S. 931, 939 (1988) ("Federal crimes are defined by Congress, and * * * this Court must give effect to Congress' expressed intention concerning the scope of the conduct prohibited"); *Liparota* v. *United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute"). "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). For these reasons, Congress' determination that particular conduct warrants the imposition of criminal sanctions must be "plain[ ] and unmistakabl[e]". *United States* v. *Gradwell*, 243 U.S. 476, 485 (1917)(quoting *United States* v. *Lacher*, 134 U.S. 624, 628 (1890)).

2. Section 641 Cannot Apply To Information Whose Disclosure Is Not Prohibited By Statute Or Regulation

The Fourth Circuit's interpretation of the words "without authority" would put the decision to criminalize the

dissemination of particular kinds of government information in the hands of individual executive branch workers. See *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 925 (4th Cir. 1980) (§ 641 as written provides no standard for exercise of discretion by upper level government employees and may result in arbitrary denial of access to public information). The "internal policies, customs and practices" of a government agency – precisely the thin reed on which the petitioners' convictions were hung – are often unclear and confusing.[7] Reliance on them in this context would subvert

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[7] A Senate hearing that took place before the effective date of the Procurement Integrity Act (see pages 14-15, *infra*) concerning "DoD's Management of Inside Information in the Acquisition Process" provides some insight into the highly confusing nature of the informal practices at issue in this case. *Oversight of DoD's Management of Inside Information in the Acquisition Process: Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate*, 101st Cong., 1st Sess. (1989) [hereinafter "*Oversight Hearing*"]. The hearing was dominated by discussions of practices relating to disclosure of procurement and planning information that were in effect at the time of Petitioners' conduct. The hearing's participants concluded that not only were the Pentagon's practices unclear and misunderstood but, because they provided no guidance as to what types of procurement documents were disclosable, DoD representatives had great discretion to make their own judgments on disclosure of government information. See, *e.g.*, *Oversight Hearing* at 3 (Sen. Levin)("a review of the services' policies and regulations reveals a system of rules and regulations that are highly complex, confusing, unclear, and occasionally misunderstood even by the officials responsible for administering them."); *Oversight Hearing* at 44 (Sen. Levin)("So those two guidances which are pointed to as the standard for whether something is disclosable doesn't [sic] give you guidance on disclosability, because under both * * * of those standards, contractors can have access to those documents"). This confusion concerning internal practices was

(continued...)

Congress' power to determine what conduct should be subject to criminal sanctions and permit arbitrary results obviously contrary to congressional intent.[8] For example, the manager of a section in an executive agency could circulate an informal policy memo (or adopt an informal custom) declaring that no dissemination of information to the public may be made that would be embarrassing to his or her agency or to the President. A reporter or historian who obtained this information through an interview of a government employee and without resort to bribery or other improper means would then be subject to criminal sanctions.[9]

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[7] (...continued)
made even worse by the high turnover in procurement positions at DoD. *Oversight Hearing* at 28 (Sen. Kohl).

As a result of the concerns expressed at the Hearing, Dr. Robert Costello, Under Secretary of Defense for Acquisition, declared that there was a need for "a clear and comprehensive statement of DoD's disclosure policies in a single document which will be widely distributed to both contractors and DoD personnel by the end of the year." *Oversight Hearing* at 45. Senator Levin concluded: "[we need] to make sure there is a line, so that we do not put people at peril and at risk in trying to get information." *Oversight Hearing* at 62.

[8] Senator Levin remarked that the DoD practices in place at the time of Petitioners' conduct permitted individual procurement officers to have discretion over disclosure of government information: "Document type after document type after document type is either disclosable or not disclosable according to individual procurement officers by their judgment as to whether or not that 'For Official Use Only' stamp allows it to be disclosed, and that doesn't tell you a damn thing." *Oversight Hearing* at 44 (Sen. Levin).

[9] Ironically, while Petitioners were convicted of receiving information contrary to certain informal practices, their receipt of
(continued...)

Such an outcome flies in the face of separation of powers principles by providing executive branch employees with the authority to, in essence, pass new criminal statutes.[10] It would enable individual employees to determine what is deserving of "the moral condemnation of the community." *Bass*, 404 U.S. at 348. This formulation is plainly incorrect in that it provides no "assur[ance] that the society, through its representatives, has genuinely called for the punishment to be meted out." *United States* v. *R.L.C.*, 112 S.Ct. 1329, 1340 (1992) (Scalia, J., concurring). Permitting informal agency policies and practices concerning information to form the test

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[9] (...continued)
this information was consistent with other informal methods of operation at the Department of Defense regarding the sharing of information with contractors. As explained by Senator Grassley, the informal exchange of information between government and contractors had become so widespread prior to the enactment of the Procurement Integrity Act, it had "become a way of life," and a "cultural phenomenon" within the military-industrial complex. 135 Cong. Rec. S15960 (Nov. 17, 1989) (statement of Sen. Grassley). Then-Under Secretary of the Navy Garrett declared that within the sphere of government contracting, the information gathering activities of private corporations, even if to gain advantage over competitors, were "indispensable to proper fusion of Government's requirements with industry's capabilities." (*Oversight Hearing* at 74). Thus, adopting the government's interpretation would permit prosecutors to pick and choose among various internal policies to determine what they believe should define criminal sanctions. This is hardly the kind of "clear and unambiguous" demarkation of criminal conduct that this Court has declared to be Congress' role.

[10] Cf. *Liparota*, 471 U.S. at 427 ("Of course, Congress could have intended that this broad range of conduct be made illegal, perhaps with the understanding that prosecutors would exercise their discretion to avoid such harsh results. However, given the paucity of material suggesting that Congress did so intend, we are reluctant to adopt such a sweeping interpretation.").

of criminal conduct would render Section 641 a penal statute of sweeping application that would "encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Accordingly, because the Court of Appeals' decision would violate separation of powers principles and contravene congressional intent, this Court should reverse that decision.

II. INFORMATION IS NOT A "THING OF VALUE" UNDER SECTION 641

It is not clear that Section 641 should be applied to information at all. There is nothing in Section 641 or in its legislative history to suggest that Congress intended to reach this delicate area. *United States* v. *Tobias*, 836 F.2d 449, 451 (9th Cir. 1988) (section 641 inapplicable to information), *cert. denied*, 485 U.S. 991 (1989); *Truong Dinh Hung*, 629 F.2d at 926 ("Congress was never consciously aware that § 641 would punish the unauthorized disclosure of government information").[11] It is at least a plausible construction of Section 641 that "thing of value" should apply only to tangible items. *United States* v. *Tobias*, 836 F.2d at 451. The "conversion" prohibited by Section 641 was not intended to be a new crime. Rather, Section 641 was designed "to recodify [crimes] then in existence." *Morissette* v. *United States*, 342 U.S. 246, 269 n.28 (1952). At common law, only tangible property could be "converted." 89 C.J.S. *Trover and Conversion* § 11 (1955).

For all of these reasons, the "thing of value" language must be considered, at a minimum, to be ambiguous. Where a narrower construction of an ambiguous criminal statute is plausible, the rule of lenity requires the Court to adopt the more restrictive reading. See *United States* v. *Kozminski*, 487

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[11] See also Benjamin DuVal, *The Occasions of Secrecy*, 47 U. Pitt. L. Rev. 579, 595-96 n.42 (1986)(Congress did not contemplate restricting access to information by enacting Section 641).

U.S. at 952 (1988) ("uncertainty regarding the ambit of criminal statutes should be resolved in favor of lenity"). Here, the rule of lenity dictates that the term "thing of value" should not be read to include government information.

The Court of Appeals' reading of Section 641 is especially anomalous because it makes a mockery of Congress' carefully considered action in enacting the Procurement Integrity Act of 1988 ("PIA"). 41 U.S.C. § 423 (Supp. 1992). Congress' determination that this legislation was necessary demonstrates that it did not believe that Section 641 applied to Petitioners' conduct. The legislative history of the PIA reveals myriad examples of Congress' belief that no law existed to prohibit receipt of unclassified procurement information.[12] Because of this belief and in order to enable contractors and the Pentagon to adjust their conduct in light of the Act's criminal penalties to what Congress viewed as a substantially different regime, Congress initially delayed the effective date of the PIA for six months. See Pub. L. No. 100-679, § 6(b), 102 Stat. 4068 (1988). Congress then delayed the effective date for an additional two months to permit contractors to become familiar with the new

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[12] During debate on 1989 legislation that would have repealed the PIA, Senator Grassley declared: "This is the only law on the books that restricts the use of nonclassified procurement information." By repealing it "there is not going to be any law to stop the * * * practice of document trafficking within the contracting community." 135 Cong. Rec. S15961 (Nov. 17, 1989). Senator Grassley also stated that prosecutors with whom he had spoken believed that pre-PIA law was adequate for prosecution of procurement cases only where "there was evidence of bribery or conspiracy or some other illegal activity. But without this law, there are no prohibitions to giving sensitive information to favored contractors. That's what we're talking about here." 135 Cong. Rec. S15992 (Nov. 17, 1989). There is no suggestion in this case that Petitioners obtained the information in question through bribery or other improper means.

regulations implementing the PIA. See Pub. L. No. 101-28, 103 Stat. 57 (1989); 135 Cong. Rec. H1876 (May 15, 1989)(remarks of Rep. Conyers). Finally, despite intense efforts by certain members, Congress suspended the effective date of the Act for a year until December 1, 1990, when it ultimately became effective. See Pub. L. No. 101-194, § 507(1), 103 Stat. 1759 (1989).

Absent any mention of government information in Section 641, then, and in view of Congress' demonstrated ability to provide particular provisions concerning information where its statutes concern information dissemination, the Court should conclude that Congress did not intend that Section 641 apply to information.

III. MEANS OTHER THAN IMPOSING CRIMINAL SANCTIONS ON THE RECIPIENT ARE AVAILABLE TO ENFORCE LEGITIMATE INTERNAL RESTRICTIONS ON DISSEMINATION OF GOVERNMENT INFORMATION

Amici do not mean to suggest that there can be no informal restrictions on the disclosure of government information. However, the difficulties inherent in limiting the dissemination of government information are particularly acute where criminal sanctions are threatened or imposed on private citizens who acquire the information without resort to bribery or other improper influence. The factors outlined above weigh against the imposition of criminal sanctions on private citizens for simply receiving government information absent "carefully drawn legislation." Stewart, 26 Hastings L.J. at 636. The balance of these factors may weigh differently when government employees are the subjects of particular restrictions, especially when criminal sanctions are not at issue.

The Executive Branch may limit the dissemination of government information through informal restrictive policies

constraining government employees in some instances. DuVal, 47 U. Pitt. L. Rev. at 672 ("Informal pressures and administrative sanctions * * * are the principal means of preventing the dissemination of government controlled information."); Harold Edgar & Benno Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Secrecy*, 21 Harv. C.R.-C.L. L. Rev. 349, 356 (1986)("No one doubts that the Executive can invoke a wide range of administrative sanctions to enforce secrecy rules on its employees; the more difficult questions concern resort to broader sanctions that must be enforced by the courts."). Along with these internal policies, agencies may impose disciplinary measures on employees who violate the policies. Those who are aware of the informal policies and practices are then presumably aware of the corresponding penalties for breach. In this manner, agencies have the means to enforce legitimate interests in confidentiality while providing the requisite notice of penalties to government employees.

However, to enforce these internal policies against private citizens through criminal prosecution is intolerable in our system of government. See Edgar & Schmidt, 21 Harv. C.R.-C.L. L. Rev. at 406 ("Perhaps it is tolerable to permit the Executive to shape the conditions of government employment without clear guidance, but for the courts to use the criminal law this way ignores the prohibition on common law crimes."). Whatever the authority of the Executive Branch to discipline its employees for the violation of internal rules, it is up to Congress to decide what conduct to punish criminally. In the case of procurement sensitive information, Congress decided to criminalize its disclosure and receipt, but *after* the acts at issue here.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 1993